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Nos. 95-1455 & 95-1508

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES,
Appellant, and
GEORGE PRICE, *et al.*,
Appellants,
v.
BOSSIER PARISH SCHOOL BOARD,
Appellee.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF APPELLANTS GEORGE PRICE, ET AL.

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57 pp

QUESTIONS PRESENTED

I. Whether evidence probative of discriminatory purpose under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), may be excluded from consideration in a preclearance action under Section 5 of the Voting Rights Act solely because that evidence also would be relevant to a discrimination action brought under Section 2 of the Act.

II. Whether evidence probative of discriminatory purpose under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), may be excluded from consideration in a preclearance action under Section 5 solely because the election plan at issue is not retrogressive.

III. Whether the court in a Section 5 preclearance action may itself assume the burden of explaining and rebutting clear evidence of discriminatory purpose when the covered jurisdiction fails to carry that burden.

IV. Whether a covered jurisdiction meets its burden of proof in a Section 5 preclearance action when it merely identifies some nondiscriminatory reasons for its redistricting plan, but fails to rebut clear evidence showing other discriminatory reasons for the plan.

V. Whether the fact that a nonretrogressive voting change would result in a clear violation of Section 2 constitutes an independent basis for the denial of preclearance under Section 5.

PARTIES TO THE PROCEEDINGS

The Defendant-Intervenors below, Appellants George Price, *et al.*, who are not listed in the caption are:

Leroy Harry
Thelma Harry
Clifford Doss
Otis Easter
Jerry Hawkins
Barbara Stevens King
Hurie Jones
Grover Cleveland Jaggers
Floyd Marshall
Rubie Fowler

All other parties are named in the caption.

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OPINIONS BELOW

The decision of the United States District Court for the District of Columbia ("D.C. District Court") is reported at 907 F. Supp. 434 (D.D.C. 1995). App. 1a-65a.[1]

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[1] In this brief, citations are to the Appendix ("App.") filed with the Jurisdictional Statement of Janet Reno, *et al.*, on March 11, 1996, including the numerous stipulations of the parties ("Stip."); to the Joint Appendix ("J.A.") filed on August 1, 1996; to the transcript of the hearing in the D.C. District Court on April 10 and 11, 1995 ("Tr."); and to exhibits submitted at that time by the appellee ("Plaintiff's Exh."), and the two appellants, Janet Reno

JURISDICTION

The decision of the three-judge panel of the D.C. District Court, which had jurisdiction pursuant to 42 U.S.C. § 1973c, was entered on November 2, 1995. The Attorney General's notice of appeal was filed on December 27, 1995. App. 163a-164a. The notice of appeal on behalf of defendant-intervenors George Price, *et al.* ("Defendant-Intervenors"), was filed on January 2, 1996. On February 28, 1996, the Chief Justice extended the time in which to file a jurisdictional statement on behalf of Defendant-Intervenors to March 18, 1996. The Attorney General and Defendant-Intervenors timely filed jurisdictional statements, and the Court noted probable jurisdiction on June 3, 1996. The Court has jurisdiction over this appeal pursuant to 42 U.S.C. § 1973c.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. § § 1973, 1973c, are reproduced in the Appendix to the Jurisdictional Statement filed by Janet Reno in No. 95-1955. App. 165a-167a.

("U.S. Exh.") and defendant-intervenors George Price, *et al.* ("D-I Exh.").

STATEMENT OF THE CASE

I. INTRODUCTION

This case concerns the actions of the 12-member Bossier Parish School Board ("Bossier" or the "Board"). In Bossier Parish, racially polarized voting and majority-white, single-member districts precluded blacks from ever being elected to the Board, even though they make up 20% of the populace. Year in and year out the 12 majority-white districts elected all-white boards, and year in and year out the interests of blacks in participating in educational policy-making and in advancing the long-delayed desegregation of the schools was thwarted.

Nevertheless, in its 1990 redistricting, the School Board refused even to consider a plan that would have created a majority-minority district, even though two such districts could have been drawn. Worse, in order to avoid drawing such a district and in order again to draw 12 majority-white districts, the Board transgressed many of its own redistricting criteria; *i.e.*, it forced incumbents to run against each other, it drew one district containing almost half of the Board's entire geographic jurisdiction and others that are not compact by the admission of the Board's own consultant, and it created some districts without any schools in them at all and that ignored school attendance zones. Furthermore, the explanations offered by the Board for adopting such districts were plainly pretextual, and statements by individual Board members confirmed the Board's intent to prevent blacks from electing their candidates of choice.

In these circumstances, and under the well-established standards articulated by this Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Attorney General not surprisingly refused preclearance under Section 5 because the Board's redistricting plan had been adopted with a discriminatory purpose. But, by a 2-1 vote, the

three-judge court below, failing to apply the proper legal standard, held that the Board had met its burden of proving that racial discrimination was not a factor in the adoption of its redistricting plan.

As we will show, the majority was able to reach this result only by refusing to consider most of the critical evidence of record, and by offering justifications for the rest that even the Board itself had not offered. As we will also show, the majority's approach flatly contradicts this Court's requirements that the Board itself establish the absence of any discriminatory purpose and that all relevant information be considered in determining whether the Board met that burden. When those requirements are followed, as Judge Gladys Kessler held in dissent below, the evidence of record "demonstrates overwhelmingly that the School Board's decision . . . was motivated by discriminatory purpose." App. 63a.

It would be anomalous if this Court now rejected Judge Kessler's diligent application of Section 5's purpose prong, for in order to guarantee constitutional Equal Protection the Court recently has imposed stringent requirements on states openly seeking to draw majority-minority districts. *See Shaw v. Hunt,* Nos. 94-923 and 94-924, 1996 WL 315870 (U.S. June 13, 1996) *("Shaw II")*; *Bush v. Vera*, Nos. 94-805, 94-806 and 94-988, 1996 WL 315857 (U.S. June 13, 1996). If, at the same time, the Court endorsed the majority's truncated purpose inquiry and abandoned the rigorous standards it has traditionally applied to jurisdictions seeking to perpetuate the long-standing exclusion of blacks from full participation in the political process, the result would be to subvert the central premise of the Fourteenth Amendment. As Justice O'Connor has recently written, "the driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks." *Miller v. Johnson,* 115 S. Ct. 2475, 2497 (1995) (O'Connor, J., concurring). *See also Vera*, 1996 WL 315857, at *24 (O'Connor, J.,

concurring). The Bossier Parish School Board contradicted this fundamental proposition in this case, and its action should not be upheld by this Court.

II. STATEMENT OF FACTS

The facts in this case are largely undisputed and are nearly all either stipulated or unrebutted. Rather, the dispute in the case is over which of these facts may be taken into account in determining whether the Board met its burden to show that its redistricting plan was in no part motivated by a discriminatory purpose. Three kinds of facts are relevant to that issue: (a) the demographics of Bossier Parish and the longstanding exclusion of blacks from the School Board; (b) the prior undisputed discrimination against blacks in voting and in the Parish's schools, and the ongoing exclusion of blacks from any policy-making role in the schools; and (c) the circumstances surrounding the adoption of the redistricting plan.

A. Voting Polarization and the Exclusion of Blacks From the Board

In 1990, blacks comprised 20.1% of the total population of Bossier Parish, and 17.6% of the voting age population. App. 2a. Blacks also comprised 29% of the students in the Parish's public schools. *Id.* at 4a n.2.

The parties stipulated and the court below found that the black population of the Parish is concentrated in two areas; more than 50% of the black residents live in Bossier City, App. 2a; *id.* at 68a (Stip. 10), and another significant percentage of those residents is concentrated in communities in the northern rural portion of the Parish. *Id.*

Stipulated facts and unrebutted testimony also show that black voters in Bossier Parish are politically cohesive. *See, e.g.,* App. 123a (Stip. 184). The parties likewise agreed to facts showing that voting in the Parish is racially polarized, *id.* at 40a, 122a-27a (Stip. 181-96),

and that "voting patterns in Bossier Parish are affected by racial preferences," *id.* at 122a (Stip. 181). Similarly, the stipulated facts leave no doubt that whites vote sufficiently as a bloc to enable them usually to defeat the preferred candidates of black voters. App. 127a (Stip. 196). Finally, the record showed that, as a result of these factors, no black candidate had ever been elected to the School Board. App. 4a, 40a-41a.[2]

The record furthermore showed that the creation of 12 majority-white election districts was not dictated by adherence to traditional redistricting principles. As found by Judge Kessler—the only member of the panel to address the stipulated facts concerning the Parish's demographics—"it was clearly possible to draw a redistricting plan for the Bossier Parish Schools with one or two majority-black districts, and still respect traditional districting principles." App. 41a. The majority made no contrary finding. Likewise, Judge Kessler found, and again the majority did not dispute, that "the Board's plan presents the black minority of Bossier Parish with no

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2 This Court properly refused to supplement the record with information concerning the fact that no white candidate ran in one district and a black candidate defeated a white candidate in another district in School Board elections held *after* the district court's decision below. *Reno v. Bossier Parish Sch. Bd.*, 116 S. Ct. 1540 (1996). As this Court recently indicated in *Vera*, reliance on election results after the redistricting has been completed "is misplaced." 1996 WL 315857, at *12 fn. This is because evidence of events that occurred after the Board's decision cannot illuminate its intent at the time it made the decision. *See, e.g., McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 885 (1995); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250, 252 (1989); *id.* at 261 (O'Connor, J., concurring). This is particularly true where, as here, the pending litigation itself may well have had an impact on the election. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 76 (1986); *Clark v. Calhoun County*, 21 F.3d 92, 96 (5th Cir. 1994).

realistic opportunity to elect any candidates of its choice to any of the board seats." App. 41a.

B. Prior Uncontested Discrimination in Voting and Education, and the Exclusion of Blacks From Educational Policymaking

The uncontested evidence also detailed the long history of discrimination against blacks in Bossier Parish. *See* App. 42a-46a; 130a-40a (Stip. 214-48). Judge Kessler, again the only member of the panel to consider this evidence, chronicled in detail the stipulated facts showing that many decades of discriminatory government action in Bossier Parish had resulted in the large-scale disenfranchisement of black voters. App. 42a-44a. Following the passage of the Thirteenth Amendment, Louisiana enacted laws intended to reduce black voting; black registration decreased by 90% within a few years. App. 43a; *id.* at 130a-31a (Stip. 215-19). In 1921, an amendment to the State Constitution required persons seeking to register to vote to "give a reasonable interpretation" of a constitutional provision. *Id.* at 44a, 132a (Stip. 221). That amendment, which disenfranchised most black citizens, was not invalidated until 1965. *Louisiana v. United States*, 380 U.S. 145 (1965). After an all-white Louisiana Democratic primary was invalidated, the party then adopted an anti-single-shot law and a majority-vote requirement for party office. App. 43a-44a; *id.* at 132a (Stip. 222); *Major v. Treen*, 574 F. Supp. 325, 341 (E.D. La. 1983).

In addition to this discrimination in voting, which affected all of the Parish's governing bodies, the Board itself also maintained *de jure* segregation in its schools long after *Brown v. Board of Education*, 347 U.S. 483 (1954). App. 44a-46a; App. 136a (Stip. 235). While the Board has been a defendant for more than 30 years in the school desegregation case of *Lemon v. Bossier Parish School Board*, C.A. No. 10,687 (W.D. La.), Judge Kessler noted that it still has not fulfilled its constitutional obligations to remedy segregation and

establish a unitary school district. App. 45a. *See Lemon v. Bossier Parish Sch. Bd.*, 240 F. Supp. 709 (W.D. La. 1965), *aff'd*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967).

More significantly, since 1980 the schools in Bossier Parish have become increasingly segregated by race. App. 45a ("the number of elementary schools with predominantly black enrollments has increased from one to four"); *id.* at 137a-38a (Stip. 240-42). While the District's total school enrollment is only 29% black, Bossier and Butler Elementary Schools, whose attendance areas are adjacent to one another in Bossier City, were 77% and 74% black in 1994, U.S. Exh. 84YY, compared to 39% and 44% black in 1980. U.S. Exh. 84KK. Likewise, both schools in Board Member Thomas Myrick's district in the northern portion of the Parish have become more than 75% black. J.A. 150 (Myrick).

The Board not only failed in its affirmative duty to desegregate, but also violated the specific terms of the outstanding consent decree in *Lemon*. App. 45a. For example, while the consent decree requires the Board to follow the *Singleton* standards and assign teachers to schools by race in approximately their proportion in the District as a whole, the Board has assigned black teachers disproportionately to predominantly black schools, such as Bossier and Butler Elementary Schools, contributing to their increasing racial identifiability. *See Singleton v. Jackson Mun. Separate Sch. Dist.*, 419 F.2d 1211, 1218 (5th Cir. 1969), *cert. denied sub nom. West Feliciana Parish Sch. Bd. v. Carter*, 396 U.S. 1032 (1970); App. 137a-38a (Stip. 239-40); J.A. 179 (Lewis) (admitting *deliberate* assignment of more than 70% black faculty to predominantly-black Butler Elementary School, despite the fact that district-wide black faculty had declined to less than 10%); Plaintiff's Exh. 14 at 4 (Lewis).

The Defendant-Intervenors repeatedly have tried—but unsuccessfully—to persuade the Board to address these

and other concerns about the treatment of black school children in Bossier Parish. *See* App. 96a-97a, 104a, 105a, 137a-38a (Stip. 95, 115, 117, 240). U.S. Exh. 32 at 50 (Board Minutes). For example, appellant George Price, the president of the local NAACP, repeatedly has asked the Board to attempt to hire more black teachers. App. 96a-97a, 104a, 105a (Stip. 95, 115, 117). Since 1980, the percentage of black teachers in the District, however, has fallen from 14% to less than 10%. App. 137a-38a (Stip. 240).

The Board has remained nonresponsive to all these concerns, despite a court-ordered obligation to maintain a bi-racial committee to "recommend to the School Board ways to attain and maintain a unitary system and to improve education in the parish." App. 103a-06a (Stip. 111-17). For decades, the Board ignored this requirement altogether. *Id.* at 103a-04a (Stip. 112). In 1993, the Board established a committee ostensibly to serve this function. *Id.* at 104a (Stip. 113). However, when black members of the committee raised not only problems, but potential solutions as well, the Board unilaterally disbanded the committee. *Id.* at 105a (Stip. 116). As Board members Thomas Myrick and Barry Musgrove explained in their direct testimony, Plaintiff's Exh. 15 at 15 (Musgrove); Plaintiff's Exh. 16 at 16 (Myrick), they did not want this committee getting into "policy" questions. *Id.* Judge Kessler found that as a result the Board "unilateral[ly] dismantl[ed] the Committee . . . in direct violation of a federal court order to address the concerns of the black community." App. 46a.

The effects of this longstanding discrimination continue to affect both the school children of Bossier Parish and its adult voters. "Black citizens of Bossier Parish suffer a markedly lower socioeconomic status than their white counterparts" that is "traceable to a legacy of racial discrimination affecting Bossier Parish's black citizens." *Id.* at 128a (Stip. 200); *see id.* at

127a-30a (Stip. 197-213). Judge Kessler alone reviewed these stipulated facts and their consequences, App. 52a-53a, and she concluded that "the depressed socioeconomic and educational levels" of blacks within Bossier Parish "make it hard for them to obtain necessary electoral information, organize, raise funds, campaign, register, and turn out to vote, and this in turn causes a depressed level of political participation for blacks within Bossier Parish." App. 52a.

This history of discrimination and its effects is important in this case for two reasons: it forms an important backdrop to the Board's redistricting decision, and it explains why black citizens were so concerned that a majority-minority district be fairly considered in that process.

C. The Redistricting Process

The Board's redistricting decision occurred in four stages: first was the prior adoption and preclearance of a plan by the governing body of the Parish, the Bossier Parish Police Jury ("Police Jury"); next was the Board's decision not to adopt the same plan approved by the Police Jury, but to formulate one of its own; third was the reversal of that decision and the hasty adoption of the Police Jury plan, despite its departures from the School Board's own redistricting criteria and notwithstanding rising support in the Parish for a majority-minority district; finally came the Board's series of shifting pretextual explanations for its decision, rationalizations that continued to change from the administrative preclearance process through the proceedings in the court below.

1. Police Jury Redistricting. Throughout the 1980s the Police Jury and the School Board had different election districts. App. 72a (Stip. 22). Although not required by law, both had 12 single-member districts during the 1980s. *Id.* Moreover, both had 12 majority-white districts. App. 2a-4a. Population changes

required each to reapportion after the 1990 Census. App. 3a-4a.

The Police Jury's redistricting efforts preceded the School Board's. During the Police Jury's redistricting process, the white Police Jurors and their cartographer Gary Joiner were "specifically aware that a contiguous black-majority district could be drawn both in northern Bossier Parish and in Bossier City." App. 76a (Stip. 36), 82a-83a (Stip. 53), 114a (Stip. 148). In fact, the parties stipulated that it was "obvious that a reasonably compact black-majority district could be drawn within Bossier City." App. 76a (Stip. 36). The Police Jurors also were aware that alternate configurations for a contiguous majority-black district in the northern part of the Parish could be created. App. 114a (Stip. 148).

However, they deliberately misled the public, *id.* at 83a (Stip. 54), the only black police juror, *id.* at 80a-81a (Stip. 47), and the Attorney General herself, *id.* at 87a (Stip. 65-66), by claiming that drawing any majority-black district was impossible. App. 3a. Despite these misrepresentations, some black community groups opposed the plan and specifically asked that their letter expressing concerns about it be included in the Police Jury's Section 5 submission. App. 3a; *id.* at 69a, 87a (Stip. 11, 65-66). Nevertheless, Joiner and the Police Jury did not include it. App. 87a (Stip. 65-66).

One of the School Board members, Thomas Myrick, participated in between five and ten private meetings about the Police Jury's redistricting with Joiner and white police jurors. App. 5a; *id.* at 81a, 93a-94a (Stip. 48, 85).[3] Mr. Myrick lives in an area that the

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[3] Despite the Board's stipulations about Myrick's meetings with Joiner and the Police Jurors, App. 81a, 93a-94a (Stip. 48, 85), and Joiner's live testimony about "probably half a dozen" such meetings, J.A. 161-64 (Joiner), Myrick denied on the witness

parties stipulated "would likely be included in any majority-black district to be drawn in the northern part of Bossier Parish." *Id.* at 81a (Stip. 48). Myrick was concerned about his district, J.A. 162-63 (Joiner), and indicated to Joiner in these meetings that he did not want a majority-black district. *Id.* at 163.

In April 1991, the Police Jury adopted a reapportionment plan with all majority-white districts. App. 3a, 68a (Stip. 11). As the majority found, Myrick later would be the first to recommend this plan to his fellow Board members. App. 5a. He also took the lead in the Board's redistricting process, and several other Board members deferred to him. *See, e.g.*, U.S. Exhs. 95 at 34-35 (Jackson); 100 at 71 (Rodgers); 86 at 37-38 (Barerra).

On May 28, 1991, the Police Jury submitted its redistricting plan to the Attorney General seeking preclearance under Section 5. As noted, the Police Jury withheld from its submission the complaints of black citizens and the information revealing that reasonably compact majority-black districts could be created. App. 68a-69a (Stip. 11). On July 29, 1991, based on this incomplete information, the Attorney General precleared the plan. *Id.* at 3a, 68a-69a (Stip. 11).

The Police Jury's 1991 redistricting plan cut across many of the precinct lines established in the 1980s to facilitate elections under the Parish's various election plans. App. 88a (Stip. 70). Indeed, the new plan resulted in the creation of 20 additional precincts (for a total Parish-wide of 56). *Id.;* D-I Exh. G ¶ 36 (Cooper). Police juries are empowered by state statute to establish such new precincts. App. 70a (Stip. 15).

The Police Jury's plan not only diluted minority voting strength, but it also drew precinct lines that severely

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stand that any of them took place. J.A. 150-51, 156-57 (Myrick). The majority rejected Myrick's testimony. App. 5a.

fragmented black communities: only two of the Police Jury's 56 precincts are majority black, and they contain only 3,000 of the Parish's 86,000 people. Tr. I at 177-78 (Joiner).

2. The School Board's Initial Decision. School boards in Louisiana do not possess independent authority to establish or change precinct lines themselves; if a school board and police jury have the same number of election districts, the board's election districts must be composed of whole precincts established by its police jury. App. 71a (Stip. 21). Nevertheless, school boards are not bound to employ their police juries' redistricting plans or to use their original election precincts. Instead, in practice school boards have three options: first, they could fashion election plans different from those adopted by their police juries, but with the same number of districts and using the post-1990 precincts established by their police juries; second, they could choose election plans with a different number of election districts than their police juries, La. R.S. 17:71.3E; or third, they could develop election plans independently and then have their police juries create new precincts to accommodate both election plans. App. 72a (Stip. 22); *see also* J.A. 136-43(Creed).

The undisputed evidence showed and the majority found that the third option was quite common. App. 6a-7a. Moreover, there was no evidence showing that any police jury had ever denied a school board's request to alter precinct lines to accommodate a school board's favored redistricting plan.

As the majority found and the parties stipulated, the Board in this case entered the redistricting process well aware that if it did not adopt the Police Jury's plan it likely would need to have new precincts established. App. 29a; *id.* at 95a (Stip. 89). While, in October of 1990, the Board had directed its superintendent to contact the Police Jury about jointly developing an election plan, the Police Jury had not been interested,

App. 93a (Stip. 83, 84), and the Board hoped that it "could derive [its] own plan." Tr. I. at 44 (Musgrove).

Moreover, when the Board began its redistricting process in earnest it envisioned this prospect and hired Gary Joiner to perform 200 to 250 hours of work, far more than would be necessary simply to recreate the Police Jury plan. *Id.* at 94a (Stip. 86-87). After the Police Jury plan received preclearance in the summer of 1991, however, Thomas Myrick suggested that the Board adopt the Police Jury plan. App. 5a. Nevertheless, on September 5, 1991, the School Board decided not to adopt the Police Jury plan. *Id.* As Judge Kessler found, the Board rejected the already-precleared Police Jury plan "largely because it would pit incumbents against each other." App. 47a. *See also* App. 5a (majority's finding that "[n]o action was taken on Myrick's proposal"); *id.* at 8a (majority's finding that plan "pits two pairs of incumbents against each other, leaving two districts with no incumbents").

As a result, over the course of the next year, School Board members considered a number of different redistricting options, *id.* at 47a, including adjusting their 1980 plan, U.S. Exh. 98 at 18 (Hensley), or developing a plan with five, seven or nine districts, Tr. I at 44 (Musgrove). The Board's cartographer Gary Joiner met privately with the members and demonstrated different possibilities to them on his computer. App. 47a; App. 97a (Stip. 96). These meetings were not open to the public, nor were there any recorded minutes or published notices of the meetings. *Id.* at 47a. According to Joiner, moreover, all records of the alternatives considered by the Board disappeared in a series of computer disasters. J.A. 165-66 (Joiner).

3. The School Board's Reversal of its Initial Decision and Refusal to Consider Proposals from the Black Community. Meanwhile, as Judge Kessler described it, "[w]hile the School Board was meeting and planning in private, the black community was trying,

unsuccessfully, to participate in public." App. 47a. On March 25, 1992, George Price wrote to the Board requesting that a coalition of black community groups be included in the redistricting process. App. 5a; App. 47a; *id.* at 96a (Stip. 93). The Board neither responded to this letter nor took any action to include the NAACP, other black civic groups, or Mr. Price in the redistricting effort. *Id.* In August 1992, Mr. Price sent another letter asking to be involved. J.A. 126-27. Again, the Board made no response. App. 47a.

Frustrated by the Board's unresponsiveness, Price contacted the NAACP Redistricting Project in Baltimore, Maryland and asked it to evaluate the public assertions that no single-member districts could be drawn in Bossier Parish without a white majority. App. 47a-48a; App. 98a (Stip. 98). In response, the Project developed a partial plan for Price to present to the School Board that consisted of two hypothetical majority-black districts. *Id.* at 48a. The majority below found that when Price provided this information to the Board he was told that it would not even be considered because it did not contain an election plan for the entire Parish. App. 6a. Price therefore went back to the Project and had a complete 12-district illustrative plan drawn up, one that included ten majority-white districts. *Id.*

Nevertheless, when Price presented this completed plan at a public Board meeting on September 3, 1992, the Board summarily dismissed it, claiming that without a larger map the information could not be considered. App. 98a-99a (Stip. 100). Significantly, the parties stipulated that this plan demonstrated that "two contiguous districts with a black voting age population majority can be drawn within Bossier Parish for the Bossier Parish School Board." *Id.* at 113a (Stip. 143).

The majority found that Mr. Price also was told at the time that because the plan appeared to split precincts it could not be considered. App. 6a; *id.* at 48a, 98a-100a (Stip. 100-02). Yet, until that time, as the majority

expressly recognized, the Board had been actively considering alternatives to the Police Jury plan, all of which likely would have split precincts. *See* App. 29a; *id.* at 72a (Stip. 23); J.A. 168 (Joiner). The Board furthermore knew at the time that it was legal and feasible to draw districts that split precincts. App. 7a (quoting *id.* at 72a (Stip. 23) (Board "free to request precinct changes from the Police Jury")); *id.* at 72a, 99a-100a (Stip. 22, 102).

Despite having received an illustrative plan demonstrating the concentration of black populations in the Parish and the feasibility of drawing compact majority-minority districts, the Board did not ask its cartographer to do any further study. App. 48a. App. 100a-01a (Stip. 106). Neither did it attempt to ascertain how many of the Police Jury's newly established precincts would be split by the NAACP plan or any other plan including a majority-black district. *See* U.S. Exh. 102 ¶17 (Blunt); Tr. I at 164-65 (Joiner).[4] Likewise, the Board made no effort to ascertain the extent of any costs that might be associated with a plan that split precincts. *Id.; see also* J.A. 170-75 (Joiner).

At the Board's next regular meeting, on September 17, 1992, Mr. Price again asked the Board to consider the implications of the NAACP's illustrative plan. App. 48a, 100a-01a (Stip. 106). The Board refused, immediately passing a motion of intent to adopt the

[4] The Board's cartographer later conceded that a majority-black district in Bossier City would require only 14 precinct splits, and a plan with two majority-black districts would require 27. Tr. I at 152 (Joiner). Unrebutted testimony also established that the newly created precincts required for a plan with two majority-black districts could be consolidated with existing precincts to reduce the total number of precincts from the current 56 to 46. D-I. Exh. G ¶ 36 (Cooper).

Police Jury plan, which it had previously found unsatisfactory. *Id.* at 100a (Stip. 106).

Around this time, a narrow majority of the Board appointed Jerome Blunt as the first black person ever to serve on the Board. App. 7a. Blunt was appointed to a six-month term representing an 89% white district. *Id.* He was sworn in at the September 17, 1992, meeting but was defeated by a white candidate in the special election six months later. *Id.* As Judge Kessler found:

> Certainly, Board members knew that adopting the Police Jury plan would ignite controversy in the black community. And on the very night of that decision, the School Board appointed a black to fill a seat that they knew he would be unable to hold, hoping to quell the political furor over adoption of the Police Jury plan. [App. 54a n.9.]

On September 18, 1992, Mr. Price again wrote the Board, this time joined by a number of other community leaders, and asked it to "give the plan submitted by the NAACP [its] utmost consideration and . . . use it as a foundation" to create a plan that included majority-black districts. J.A. 128-29. The Board again did not respond.

At the legally required public hearing concerning the Board's proposed redistricting plan, many Bossier Parish voters continued to express their concerns about the Board's precipitous embrace of the Police Jury plan. An overflow crowd attended the hearing, which was held on September 24, 1992. App. 7a-8a, 48a. Fifteen people spoke against the School Board's proposed plan, most of whom objected because it would dilute minority voting strength. App. 8a; *id.* at 101a (Stip. 108). Significantly, *not one* person spoke in favor of the plan. *Id.* Furthermore, more than 500 Bossier Parish citizens presented the Board with a petition, asking it to consider an alternative redistricting plan. *Id.* at 7a-8a. This was the largest petition presented to the Board on any subject in years. App. 101a (Stip. 108).

At the September 24 hearing, Mr. Price explained in detail why the Board's alleged concerns about precinct-splitting did not justify the adoption of a plan like the Police Jury's that diluted minority voting strength. J.A. 122 (Price); J.A. 130-32; Tr. I at 52 (Myrick). He also pointed out that Mr. Joiner's public statements on behalf of the Board—that state precinct-splitting limitations prevented it from considering the NAACP's illustrative plan or any plan with a majority-black district—were completely false. *Id.*

Neither at this hearing nor at its other meetings did the Board members explain on the record any reasons for their support of the Police Jury plan. *See* U.S. Exhs. 7-36. Instead, the Board's minutes reflect only an unexplained retreat to the Police Jury plan that it had rejected a year earlier. U.S. Exhs. 32, 34, 36. Thus, no perceived strengths of the Police Jury plan are discussed or documented anywhere on the public record of the Board's action.

In contrast, both the majority and the dissent below agreed that the Police Jury plan had several significant flaws from the Board's own perspective. App. 8a; *id.* at 50a. Indeed, the plan violated many of the redistricting criteria that Board members had relied upon until the NAACP's demonstration that election plans with majority-black districts were possible. For example, the Police Jury plan pitted School Board incumbents against one another in two districts. *Id.* at 8a. Likewise, as the majority recognized, the Police Jury plan distributed schools unevenly, with some election districts containing no schools and other districts containing several. *Id.* at 8a; *see also* 72a-73a, 112a (Stip. 24, 141).

The plan also contained one district that included "almost half of the geographic area in the Parish," App. 50a, several others that were not compact according to the Board's own cartographer, Tr. I at 175 (Joiner), and one district that was not contiguous. D-I Exh. G ¶32 (Cooper). The plan also violated a state law requirement

that no election districts deviate from the one-person, one-vote ideal by more than 5%. *Id.* ¶31; La. R.S. 17:71.3 E(2)(a) and E(3)(a). Judge Kessler therefore concluded that "the Board's plan plainly violates a whole number of redistricting principles." App. 51a.

Despite these obvious substantive problems with the Police Jury plan, App. 50a-51a, the one-sided input from Bossier citizens concerned about its adoption, App. 7a-8a, and the fact that the Board was under no time pressure to decide the issue, App. 4a, the Board voted, at its very next meeting on October 1, 1992, to adopt the plan. App. 49a. As with the meetings of September 3 and September 17, 1992, the minutes of this meeting reflect virtually no substantive consideration of the plan. *See* U.S. Exhs. 7-36. While Jerome Blunt encouraged the other Board members to explore the issues being raised by the black community, the Board refused. J.A. 88-89 (Blunt); U.S. Exh. 36 at 67. Thomas Myrick, in the one verbatim statement concerning redistricting recorded in two years of Board minutes, told Blunt that this was not a question of "black and white" but of "majority rule." U.S. Exh. 36 at 67. Mr. Blunt abstained from the vote in protest, *id*; J.A. 88-89, but the white majority present voted unanimously for the Police Jury plan. App. 8a.

In these circumstances, as Judge Kessler found, "[f]aced with growing frustration of the black community at being excluded from the electoral process, the only way for the School Board to ensure that no majority-black districts would be created was to quickly adopt the Police Jury plan and put the issue to rest." App. 49a-50a. The majority similarly concluded that "[w]hen . . . the redistricting process began to cause agitation within the black community, . . . the Police Jury plan became, as Board member Thomas Myrick described it, 'expedient.'" App. 28a.

What Myrick described on the stand as "expediency," he and other Board members were more candid about in

private. Myrick, for example, told two black voters from northern Bossier Parish that he would not "let [them] take his seat away from him." App. 6a n.4. J.A. 123-24 (Price); D-I Exh. E ¶ 19 (Harry). The Board's own cartographer similarly testified that Myrick had indicated to him that he wanted to avoid the creation of any majority-black districts. J.A. 163-64 (Joiner). Board member Henry Burns told another black voter that other Board members "oppose the idea" of "black representation on the Board." App. 5a-6a n.4. J.A. 93 (Davis). And Barry Musgrove, another Board member told George Price that "there was nothing more he could do . . . [on the redistricting issue] because the Board was 'hostile' toward the idea of a black majority district." App. 6a n.4; J.A. 123 (Price).

As a result of this hostility, the Board adopted a plan that it had previously rejected and that diluted minority voting strength. Because, as noted, voting in Bossier Parish is racially polarized, App. 122a-27a (Stip. 181-96), the foreseeable impact of the Board's plan was to reduce the chances of black voters being able to elect candidates of their choice. App. 41a. According to the Board's own consultant, Gary Joiner, the adopted plan unnecessarily fragmented or "fractur[ed]" predominantly black residential areas. *Id.* at 111a (Stip. 137). Joiner defined fracturing as "taking a cohesive minority population which exhibits traits of commonality (communities of interest) and purposefully splitting it among adjoining, often white majority districts." Report of Gary D. Joiner on Behalf of Plaintiff (October 20, 1994). Dr. Castille, an opinion witness called by the Attorney General, confirmed Joiner's admission that, in the Bossier City area surrounding the two 75%-plus black elementary schools, Bossier and Butler, the Board's plan "effectively divided well-established neighborhoods that are predominantly black." J.A. 103-04 (Castille); *id.* at 102-03 (describing similar "fracturing" in Benton area in the northern portion of the Parish).

The Board members indisputably knew about these black neighborhoods and intentionally kept them together in drawing school attendance areas. U.S. Exhs. 86-101. Indeed, virtually every Board member sought to justify schools being more than 75% black by referring to predominantly black neighborhoods surrounding the schools.[5] Yet their election plan split neighborhoods around predominantly black schools. Moreover, the Board stipulated to facts showing that its plan does "not respect communities of interest in Bossier Parish." App. 50-51a (citing Stip. 135-57). Judge Kessler, who alone among the panel evaluated the effect of the plan and the historical background of the Board's decision, found that the Board split these black communities in drawing election districts because it wanted to impede black voters—who share serious concerns about the treatment of black children in the public schools—from electing candidates of their choice. App. 46a.

4. Post-hoc Rationalizations for the Board's Decision. In subsequent efforts to justify the unexplained reversal of its initial decision and its refusal to consider alternatives from the black community, the Board offered the Attorney General and the District Court a series of pretextual explanations, including several which the majority itself found "clearly were not real reasons." App. 27a n.15. For example, the School Board argued that it adopted the Police Jury plan (on October 1, 1992) to comply with *Shaw v. Reno,* 113 S. Ct. 2816 (1993) (decided June 28, 1993) ("*Shaw I*"), even though *Shaw I* was decided nine months after the Board adopted its plan. *Id.*

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[5] *See* J.A. 68 (Barerra); J.A. 69 (Blaylock); J.A. 70-71 (Burns); J.A. 72 (Gray); J.A. 73 (Jackson); J.A. 74-75 (Harvey); J.A. 76 (Hensley); J.A. 78-80 (Hudson); J.A. 81 (Rodgers); J.A. 83 (Sullivan).

The School Board also reiterated its claim that it could not adopt a plan with fewer than 12 majority-white districts because any such plan would require precinct-splitting, which it erroneously claimed violates state law. App. 56a. The majority found, however, that when "the School Board began the redistricting process, it likely anticipated the necessity of splitting some precincts." App. 29a. Indeed, as Judge Kessler found, "[i]t was only *after* the black community presented its alternative plan that the School Board proffered the 'no precinct-splitting' rationale." App. 56a (emphasis in original). Furthermore, as earlier noted, while the Board itself may not split precincts, police juries have the authority to establish and modify precinct lines, and many do so when requested by a school board. *Id.* at 69a-73a, 85a-86a (Stip. 13-25, 60-61). Here, as the majority found, the School Board never made such a request. App. 7a. Finally, the Board never expressed any concern about the fact that the Police Jury plan itself violated state law in other ways because its districts were not all contiguous and its deviation exceeded plus-or-minus 5%. *See* D-I Exh. G ¶¶ 31-32.

Nor did the School Board voice any concern in its initial submission to the Attorney General about a high number of precinct splits causing higher election costs, as it subsequently claimed. App. 57a. In fact, the Board never even estimated the cost of splitting precincts before it voted to adopt the Police Jury plan. *Id.* Obviously, "cost" did not actually motivate the School Board's decision at the time it was made. *Id.*

Bossier's final proffered justification for adopting the Police Jury plan was that it guaranteed preclearance; that is, the Attorney General would approve the School Board's plan because it was identical to the Police Jury plan which already had been precleared. App. 57a-58a. However, "guaranteed preclearance" was not the School Board's objective; if it had been, the Board would not have waited until October 1, 1992—almost 14 months

after the Police Jury plan was precleared—to adopt it. *Id.* Moreover, adopting a plan with one or more majority-black districts certainly would not have made preclearance *less likely*; quite the contrary, given the Board's history and the Attorney General's position, the Board could not reasonably have believed that a plan that would both honor traditional districting principles and improve the opportunity of black citizens to participate in the political process would have had *less chance* of preclearance than the Police Jury plan.

III. THE PROCEEDINGS BELOW

A. The Attorney General's Denial of Preclearance

While the Board had acted precipitously in approving its redistricting plan on October 1, 1992, it did not submit its plan to the Department of Justice for preclearance until January 4, 1993. App. 103a (Stip. 110). After requesting additional information, the Attorney General interposed a timely objection to Bossier's plan. *Id.* at 154a, 106a-07a (Stip. 118-19).

The Attorney General noted that new information had made clear that it was possible to draw one or more majority-black districts in Bossier Parish. App. 154a. In its Section 5 submission, the Board's only rationale for refusing to consider this possibility was its claim that drawing a majority-black district would split precincts. *Id.* The Attorney General, however, pointed out that there was no evidence that the Board had ever requested that the Police Jury realign precincts. *Id.* As the majority found, the Board never attempted this option. App. 7a.

The Board then moved for reconsideration. But rather than submitting any additional analyses by its consultant or requesting a precinct realignment from the Police Jury, the Board proffered new pretextual justifications for its plan, including the claim discussed above—which the majority below found to be obviously false, App. 27a-28a n.15—that it had been attempting to avoid racial

gerrymandering under *Shaw I*. The Attorney General denied the request for reconsideration on December 20, 1993. *Id.* at 159a, 108a (Stip. 125).

B. The Declaratory Judgment Action

On July 8, 1994, Bossier filed this action against the Attorney General in D.C. District Court. A group of black voters in Bossier Parish, George Price, *et al.*, intervened as defendants in support of the Attorney General. These Defendant-Intervenors suggested to the three-judge court that it should decide this case based solely on the issue of discriminatory purpose under Section 5.

The Attorney General agreed that the evidence clearly established discriminatory purpose, but also argued that much of the same evidence established a clear violation of Section 2 and that such a violation constitutes independent grounds for denying preclearance. Rather than face the costs of defending a Section 2 lawsuit, Bossier itself stipulated that "[s]ection 5 preclearance . . . must be denied if the plan violates Section 2." App. 11a n.7; *id.* at 144a (Stip. 257). The court below, however, rejected this invitation from the parties and ruled that a Section 2 violation is not a valid ground for denying Section 5 preclearance. *Id.* at 11a-24a.

The majority went much further, however, ruling that no "*evidence* of a section 2 violation" may be used to establish "discriminatory purpose under section 5." App. 23a (emphasis added). Ignoring the fact that much of the same evidence used in establishing a Section 2 violation is probative of discriminatory purpose under Section 5, and ignoring *Arlington Heights* and other precedents of this Court, the majority flatly held that it would "not permit *section 2 evidence* to prove discriminatory purpose." *Id.* at 24a (emphasis added).

In addition, misapplying this Court's decision in *Miller v. Johnson*, the majority refused to consider the adverse effect of the plan on black voters as evidence of

discriminatory purpose. Instead, the majority held that "the adoption of one nonretrogressive plan [that contains no majority-black districts] rather than another nonretrogressive plan that contains [some] majority-black districts cannot by itself give rise to the inference of discriminatory purpose." App. 35a. As a result of these two legal errors, the majority excluded from its consideration much of the evidence of discriminatory purpose in this case.

The majority not only ignored probative evidence, it also shifted the burden of proof away from Bossier to the Attorney General by offering its own speculation about the meaning of prior statements by Board members—statements which revealed the Board's discriminatory purpose and as to which the Board itself had offered no explanation. *See id.* at 30a-32a.

Finally, the majority concluded that the School Board had two nondiscriminatory motives: "guaranteed preclearance" and "easy implementation (because no precinct lines would need redrawing)." App. 27a-28a. While the dissent effectively exposes these two rationales as pretextual, App. 56a-59a, the majority also erred by holding that proof of some legitimate motives was sufficient to meet the Board's burden of proof. The majority thus ignored the evidence of record that the Board's action was motivated at least in part by other purposes that were discriminatory such as: diluting black voting strength; continuing to avoid the need to address the concerns of its black patrons about the operation of Bossier's public schools; and protecting Board member Thomas Myrick's seat.

Judge Kessler, alone among the panel, considered the entire "extensive record" below and applied the *Arlington Heights* standard. She concluded that Bossier had "woefully failed to satisfy" its burden of proving that it acted solely with "legitimate, nondiscriminatory motives." App. 59a, 37a (quoting *New York v. United States*, 874 F. Supp. 394, 400 (D.D.C. 1994)). Indeed,

Judge Kessler, looking at all the evidence, found that it "demonstrates conclusively," indeed "overwhelmingly," that "racial purpose fueled the School Board's decision." *Id.* at 39a, 63a.

SUMMARY OF THE ARGUMENT

This Court's precedents require a thorough and sensitive inquiry into a wide range of evidence to determine whether a racially discriminatory purpose was a motivating factor in the redistricting decision of a jurisdiction subject to Section 5. Indeed, the Court's most recent cases also make quite clear that the Court will not accept at face value a state's explanations for apparent discriminatory treatment but will carefully probe those explanations to determine whether a prohibited discriminatory purpose in fact animated the state's actions.

The majority below did not conduct the careful probing required by this Court; the majority completely failed even to undertake the inquiry long required by *Arlington Heights* and held instead that much of the evidence of discriminatory intent in this case could not be considered *at all* because it also would be relevant to a discrimination claim under Section 2 of the Voting Rights Act. This ruling is contrary to this Court's precedents and profoundly illogical. Evidence of an action's discriminatory effect on black voters is clearly relevant to the question of whether a government body acted with discriminatory purpose. Likewise, an ongoing history of intentional discrimination against the same group is at least probative of the government actor's motivation. As this Court recognized in *Arlington Heights* and *Rogers v. Lodge*, 458 U.S. 613 (1982), a variety of factors bearing on the context of an official decision may reveal its intent. By refusing even to consider such evidence of discriminatory purpose, which it dubbed "Section 2 evidence," the majority started with the assumption that the Board "did nothing bad" and only then asked if "it

did so with a non-bad motive." App. 25a n.13. This clear legal error compels reversal.

The majority also committed three other legal errors in assessing the Board's discriminatory purpose. First, the majority erroneously held that evidence of the discriminatory impact of an election plan with no majority-black districts may not be considered if the plan is not retrogressive. Second, the majority improperly supplied its own rebuttal to Board-member statements indicating discriminatory intent. And third, the majority incorrectly held that the mere presence of some legitimate, nondiscriminatory reasons for the Board's decision is sufficient in and of itself to satisfy Section 5's discriminatory purpose prong. All of this is contrary to this Court's decisions.

Moreover, even if the Board had some legitimate, nondiscriminatory reasons for its decision—which it did not—that would be no defense because discriminatory purposes also motivated its action. Here, the majority's own findings, along with the stipulated and unrebutted evidence that it erroneously failed to consider, show that racial discrimination *was* a factor. Indeed, as Judge Kessler found, the undisputed facts "demonstrate overwhelmingly" that discriminatory purposes "fueled" the Board's decision. App. 63a, 39a.

The court below also incorrectly ruled on a second issue—whether a violation of Section 2 constitutes an independent basis for denying preclearance under Section 5. Because applying the proper legal standard to this case leaves no doubt that the Board acted at least in part based upon discriminatory purposes, the Court need not reach this second issue. If it does reach the issue, however, the legislative history of the Voting Rights Act makes clear that Congress intended a violation of Section 2 to afford an independent basis for denying preclearance. The contrary interpretation offered by the court below would require the Attorney General and the D.C. District Court to preclear voting changes that they

know violate federal law. This Court should not conclude that Congress intended such a result.

ARGUMENT

I. THE BOSSIER PARISH SCHOOL BOARD'S REDISTRICTING PLAN VIOLATES SECTION 5 OF THE VOTING RIGHTS ACT BECAUSE IT WAS ADOPTED WITH A DISCRIMINATORY PURPOSE

The School Board bore the burden of establishing that its redistricting plan "does not have the purpose . . . of denying or abridging the right to vote." 42 U.S.C. § 1973c; *Rome v. United States*, 446 U.S. 156, 183 n.18 (1980) ("Under § 5, the [Board] bears the burden of proving lack of discriminatory purpose. . . ."). As the majority held, if "the evidence is equally convincing on either side, the School Board—bearing the risk of nonpersuasion—must lose." App. 26a (citing *McCain v. Lybrand*, 465 U.S. 236, 257 (1984)). When the entirety of the "extensive record" is considered under this Court's *Arlington Heights* standard, as only Judge Kessler did below, "the evidence is far from being equally convincing on either side." App 38a-39a. Rather, "[t]he evidence in this case demonstrates overwhelmingly that the School Board's decision to adopt the Police Jury redistricting plan was motivated by discriminatory purpose." App. 63a.

The majority reached a contrary decision because it made four errors of law: (1) it refused to consider evidence probative of discriminatory purpose solely because this evidence would also have been probative of a Section 2 violation; (2) it assumed that a nonretrogressive plan could not be adopted with discriminatory purpose; (3) it undertook the burden of explaining away damaging evidence that the Board itself had not explained; and (4) it supposed that so long as some nondiscriminatory reasons for the Board's plan could be identified, other discriminatory reasons could be ignored. All of this is wrong as a matter of law. And all

of it is inconsistent with the hard look this Court has given to a state's alleged justifications for redistricting decisions in *Shaw II*, *Vera* and *Miller*, and to a state's explanation for apparently discriminatory treatment of gay people and women in *Romer v. Evans*, 116 S. Ct. 1620 (1996), and *United States v. Virginia*, Nos. 94-1941 and 94-2107, 1996 WL 345786 (U.S. June 26, 1996).

Yet here, where the discrimination at issue was the kind that historically has received this Court's strictest scrutiny—racial discrimination against black people—the majority below deferred wholesale to the School Board, ignoring critical evidence, creating explanations for damaging testimony by elected officials, and turning a blind eye to what the evidence overwhelmingly showed: The Board acted in part to keep blacks voters from being able to elect their candidates of choice. This Court should not condone such action. The majority's legal errors should be corrected and, when they are, only one legal conclusion is possible: Racial discrimination was present, and preclearance therefore should have been denied.

A. The Majority Erred in Refusing to Consider Evidence of Discriminatory Purpose Under *Arlington Heights* Solely Because That Evidence Also Would Be Relevant in a Section 2 Case

The majority's most serious error was its determination that any evidence relevant to a Section 2 claim could not be used to prove discriminatory purpose under Section 5.[6] This unprecedented and illogical ruling departs from the controlling precedents of this Court.

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[6] App. 24a ("we will not permit section 2 evidence to prove discriminatory purpose under section 5"); *id.* at 23a ("*Miller* forecloses the permitting of section 2 evidence in a section 5 case"); *id.* (refusing to "consider evidence of a section 2 violation as evidence of discriminatory purpose under section 5").

The proper standard for determining the existence of a racially discriminatory purpose in a Section 5 action, as the dissent below recognized, is the constitutional standard set forth in *Arlington Heights*. App. 39a, 61a-62a. In that case, this Court made clear that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. The Court outlined, "without purporting to be exhaustive," relevant factors including:

> (1) "[t]he impact of the official action whether it 'bears more heavily on one race than another,'"
> (2) "[t]he historical background of the decision";
> (3) "[t]he specific sequence of events leading up [to] the challenged decision [including] . . . [d]epartures from the normal procedural sequence";
> (4) "[s]ubstantive departures . . . [from] factors usually considered important"; and
> (5) "administrative history" and other "contemporary statements by members of the decisionmaking body."
> [*Id.* at 266-68 (citations omitted).]

The Attorney General and the Defendant-Intervenors offered unrebutted evidence of discrimination in each of these areas and more, much of it in the form of stipulations. App. 66a-153a (Stip. 1-285). Yet the majority below refused to consider any evidence of the first two *Arlington Heights* factors—the impact of the official action and its historical background—because this evidence also would be relevant in a Section 2 case. This was plainly error under this Court's cases, and it caused the majority to exclude from consideration critical evidence this Court repeatedly has found important in discerning the presence of discrimination.

For example, in *Rogers v. Lodge*, 458 U.S. 613 (1982), this Court held that lower courts must look to "the totality of the relevant facts" to determine whether a challenged action was taken with an unconstitutional

discriminatory purpose. *Id.* at 618. In *Rogers*, this Court, invoking *Arlington Heights*, reaffirmed its conclusion in *Mobile v. Bolden*, 446 U.S. 55 (1980), that the presence of factors set forth in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), "'may afford some evidence of discriminatory'" vote dilution under the Fourteenth Amendment. *Rogers*, 458 U.S. at 620 (quoting *Bolden*, 446 U.S. at 73). Here, the majority refused even to consider the undisputed evidence with respect to the factors found relevant to a constitutional violation in *Rogers*.[7]

This was clearly wrong under the Court's voting rights decisions. As the Court reiterated just last Term, under Section 5's "purpose" prong a redistricting plan should not be precleared if "'the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.'" *Shaw II*, 1996 WL 315870, at *7 (quoting *Miller*, 115 S.Ct. at 2492) (other citations omitted).

In *Miller* as well, this Court repeatedly cited the application of *Arlington Heights* to Section 5 voting rights cases, 115 S.Ct. at 2483, 2487, 2489, and expressly acknowledged previous decisions in which the Court conducted or approved a *complete* inquiry into the presence of discriminatory purpose. *See, e.g., City of Pleasant Grove v. United States*, 479 U.S. 462 (1987);

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[7] Thus, the majority disregarded the evidence of the School Board's continuing segregation of students and teachers and its non-responsiveness to its black patrons, in direct contravention of a federal court order. App. 103a-06a (Stip. 111-17). The majority also failed to address undisputed evidence concerning racial bloc voting, App. 122a-27a (Stip. 181-95), the lack of electoral success of blacks, App. 115a-16a (Stip. 153-57), and socioeconomic disparities between whites and blacks, App. 128a-30a (Stip. 198-202, 206-12), all of which were recognized as relevant by this Court in *Rogers*. 458 U.S. at 623-26.

City of Richmond v. United States, 422 U.S. 358 (1975).[8] Even those members of the *Pleasant Grove* Court who dissented from the Court's conclusion that the jurisdiction had acted with a discriminatory purpose recognized that the appropriate standard in the Section 5 context was the intent analysis articulated in *Arlington Heights* and *Washington v. Davis*, 426 U.S. 229 (1976). 479 U.S. at 479 (Powell, J., dissenting).

The majority's rationale for excluding evidence plainly relevant to discriminatory intent under *Arlington Heights* was its view that Section 2 should not be "incorporated" into Section 5, *i.e.*, a violation of Section 2 should not be grounds for denying preclearance under Section 5. App. 23a-24a. But even if this were correct—and we submit it is not (*see infra* pp. 43-45)—it could not justify what the majority has done here.

Obviously, certain kinds of evidence showing voting rights violations would be relevant to both Section 2 *and* Section 5, and the mere fact that evidence of discriminatory purpose under Section 5 could also be relevant to a vote dilution claim under Section 2 can hardly make that evidence inadmissible in a Section 5 claim. It may be doubtful, as this Court recently observed in *Shaw II*, "that a showing of discriminatory effect under § 2, *alone*, could support a claim of discriminatory purpose under § 5," 1996 WL 315870, at *8 n.6 (emphasis added), but this observation merely confirms that such a showing is certainly *relevant* in a Section 5 proceeding.

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[8] This Court also has affirmed other three-judge district court decisions endorsing the application of *Arlington Heights* to Section 5's purpose prong. *See, e.g., Busbee v. Smith*, 549 F. Supp. 494, 516-17 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983); *City of Port Arthur v. United States*, 517 F. Supp. 987, 1019 (D.D.C. 1981), *aff'd*, 459 U.S. 159 (1982).

Not only is there no support whatever in Section 5 itself or in this Court's cases for excluding relevant circumstantial evidence merely because it would also be pertinent to a Section 2 claim, but the majority's approach would threaten to undermine completely enforcement of Section 5's discriminatory purpose prong. This is because the majority's rule would effectively insulate from Section 5 review any discriminatory state purpose not openly acknowledged on the public record. In cases of alleged discrimination against minorities, "[o]rdinarily, *only* circumstantial evidence [of the type disregarded by the majority below] is available to establish [discriminatory] intent." *Diaz v. San Jose Unified Sch. Dist.*, 733 F.2d 660, 662 (9th Cir. 1984) (emphasis added). Indeed, the type of official public statements that provide "direct evidence of the legislature's racial motivations" in racial gerrymandering cases challenging majority-minority districts, *see, e.g., Vera*, 1996 WL 315857, at *6, are unlikely ever to be present in cases of intentional minority vote dilution or racially gerrymandered majority-white districts, because jurisdictions like Bossier are obviously loath to admit publicly such unlawful racial intent.

As a result, excluding all evidence of the discriminatory impact and context of voting changes would, as Judge Kessler recognized, insulate from Section 5 review even "thinly-veiled effort[s] to deny black voters a meaningful opportunity" for participation in the political process. App. 64a. The majority's rule thus would effectively eliminate the discriminatory purpose prong from Section 5. Congress plainly did not intend such a result.

B. The Majority Erred in Concluding That Discriminatory Purpose Cannot Infect a Nonretrogressive Plan

The majority not only refused to consider "Section 2 evidence" in determining discriminatory intent under Section 5, it also held that retrogression is the *only*

discriminatory impact on minority voters that may support an inference of discriminatory purpose. App. 35a, 25a n.13. This too was error and misreads the case upon which the majority relied, *Miller v. Johnson*.

The parties agreed that Bossier's plan was not retrogressive, and, therefore, the proof below focused on discriminatory purpose. As Judge Kessler recognized, under this Court's precedents "an important starting point" in analyzing the government's purpose is the "impact of an official action—whether it 'bears more heavily on one race than another.'" App. 40a (quoting *Arlington Heights*, 429 U.S. at 266 (quoting *Washington v. Davis*, 426 U.S. at 242)). "[A]ctions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose." *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979).

Miller v. Johnson is not to the contrary. It is true that in *Miller* the Court quoted *Beer v. United States*, 425 U.S. 130 (1976), for the proposition that "'[t]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" 115 S. Ct. at 2483 (quoting *Beer*, 425 U.S. at 141). But *Beer* addressed only the meaning of discriminatory *effect* under Section 5.

Moreover, in *Miller* itself, this Court confirmed that purposeful racial discrimination remains an independent basis for a Section 5 objection even to an ameliorative, nonretrogressive plan. *Id.* at 2492. If such a plan can violate Section 5, a plan designed to perpetuate exclusive white control of the electoral process obviously can as well.

Furthermore, in *Shaw II*, this Court again recognized that an "ameliorative" plan could violate Section 5 if it "so discriminates on the basis of race as to violate the

Constitution." 1996 WL 315870, at *7 (quoting *Miller*, 115 S. Ct. at 2492). Indeed, in *Shaw II* the Court analyzed in detail North Carolina's reasons for adopting its first plan, which was not retrogressive, and for rejecting alternative plans. *Id.* at *8. If Section 5 did not reach nonretrogressive changes enacted with a discriminatory purpose, as the majority below suggests, *Shaw II*'s entire discussion of the legislature's purpose in enacting an ameliorative plan would have been unnecessary and irrelevant.

In the end, the majority's view that a nonretrogressive plan cannot be discriminatory ignores reality. Obviously, many covered jurisdictions in this country—like the Bossier Parish School Board—have had no elected black officials at all. And just as obviously, Congress did not mean to insulate such jurisdictions from a discrimination claim under Section 5 simply because they could not "retrogress" from zero. Where, as here, discrimination plays a part in choosing which communities or groups of voters to recognize in the line-drawing process, Congress plainly did not intend—and this Court has never held—that a claim of non-retrogression immunizes such discrimination from Section 5 review.[9] Such a result would transform the Board's "extraordinary success in resisting integration...[into] a shield for further resistance. Nothing could be further from the purposes of the Voting Rights Act." *Pleasant Grove*, 479 U.S. at 472.

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9 *Cf. Barnett v. Daly*, 32 F.3d 1196, 1203 (7th Cir. 1994) (Posner, J.) (refusal on racial grounds to draw lines respecting minority communities "states a claim under the Constitution").

C. The Majority Erred in Providing Its Own Rebuttal to Board-Member Statements Indicating Discriminatory Intent

The majority not only improperly refused to consider critical evidence of discriminatory intent, it also erroneously provided its own speculation and rebuttal as to evidence that it did consider. Although the Attorney General and the Defendant-Intervenors offered statements by Board members directly indicating that they were "hostile" to black representation on the Board, the Board failed to explain these statements. The majority, however, improperly offered its own rebuttal of this evidence.

Specifically, School Board member Henry Burns said that Bossier was "hostile to black representation on the School Board." App. 31a. Bossier offered no evidence explaining this statement. Indeed, the majority acknowledged that the School Board did not even "cross-examine . . . on this point." *Id.* Nevertheless, the majority concluded on its own that Burns did not mean that the Board was hostile to "black representation" but that it merely objected to "drawing of majority-black districts in order to ensure black representation on the Board." *Id.*[10] This is an interpretation entirely of the

10 As noted above, however, hostility to black-majority districts, where the alternative is unlawful dilution of minority voting strength, may be a prohibited discriminatory intent. *See supra* p. 35 & n.9. As Justice Kennedy recently noted, the Court "would no doubt apply strict scrutiny if [a government body] decreed that certain districts had to be at least 50 percent white." *Vera*, 1996 WL 315857, at *25 (Kennedy, J., concurring). Thus, the majority below set up a false dichotomy in suggesting that admitted opposition to black-majority districts is not even evidence of discriminatory intent "unless section 5 imposes an affirmative obligation to draw majority-black districts." App. 31a. Where a jurisdiction is permitted to draw majority-black districts, *unexplained* "hostility" toward the idea is clearly probative of discriminatory purpose. And, under this Court's recent decisions,

majority's own making, and it is unsupported by any evidence of record.

Likewise, with respect to Thomas Myrick's statement to black leaders that he would not let them take his seat, the majority, again based on no record evidence, attributed this to a "strong desire not to have his district so changed that his constituency is obliterated." *Id.* at 32a. Mr. Myrick testified at the hearing in this case, but he never offered that explanation, and no evidence in the record suggests that making his 46.63% black district, App. 93a (Stip. 82), into a majority-black one would have dramatically altered his constituency.[11]

Our assertion is not that statements such as these necessarily prove discrimination standing alone. Rather our position is that such statements—evidencing hostility to black representation or to the drawing of a majority-minority district—are certainly *evidence* of discrimination, at least in a racially polarized jurisdiction such as this one.

Bossier is plainly at least *permitted* to draw a majority-black district. *Vera*, 1996 WL 315857; *Shaw II*, 1996 WL 315870.

11 Moreover, the desire not to have his constituency changed is at least evidence of discriminatory intent where, as here, racially polarized voting makes a predominantly white constituency valuable to the white incumbent. *See Perkins v. City of West Helena*, 675 F.2d 201, 214 (8th Cir.), *aff'd*, 459 U.S. 801 (1982) (similar statement by white public official about difficulty of reelection in majority-black district recognized as "direct evidence of discriminatory intent"). *See also Barnett*, 32 F.3d at 1199 (if "in order to protect incumbents . . . the redistricting authority deliberately adopted devices for limiting black representation (. . . because white incumbents were thought particularly vulnerable to challenge. . .), they would be engaged in deliberate racial discrimination") (Posner, J., citing *Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985)); *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

The majority therefore erred in attempting to rebut such statements itself, rather than leaving it to the Board to address them, if it could. The majority in fact, misconstrued "the function of judicial review when it . . . speculate[d] upon what *might have*" been meant by these statements. *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34-35 (1967) (emphasis added). Indeed, as this Court recently reminded in *Shaw II*, "a racial classification cannot withstand strict scrutiny based upon speculation about what '*may have motivated*'" the state actor. 1996 WL 315870, at *6 n.4 (emphasis added).[12]

D. The Majority Erred in Concluding that the Presence of Some Legitimate Reasons for Adopting the Plan Was Sufficient for Preclearance Under Section 5

Not only did the majority ignore relevant evidence and invent its own answers for other evidence, but it also committed one further legal error in assessing discriminatory purpose: Having identified what it considered nondiscriminatory rationales for the Board's action, it failed to consider whether there were also discriminatory reasons for this action. Thus, while the majority itself found that a number of the School Board's purported reasons for adopting its election plan were pretextual, App. 27a n.15, it also concluded that "at least two of [its alleged reasons] are 'legitimate, nondiscriminatory motives.'" *Id.* at 27a (quoting *New York*, 874 F. Supp. at 400). Although these reasons too were actually pretextual, App. 56a-59a, the majority mistakenly found that they were genuine and erroneously held that this finding was sufficient to support a ruling for the Board.

However, the presence of some legitimate reason for an action is insufficient to establish that it was not unconstitutional under *Arlington Heights*. If a discriminatory purpose was *a* motivating factor in the Board's decision, preclearance must be denied. *See Pleasant Grove*, 479 U.S. at 471-72 (affirming finding of impermissible purpose where plan was motivated "in part" by discrimination).

Here, as noted above, the majority acknowledged that the Board lied about several of its alleged reasons for adopting the plan, App. 27a n.15, but nevertheless credited two: "guaranteed preclearance" and "easy implementation." The dissent effectively exposes these two rationales as "flagrantly pretextual." *Id.* at 56a-59a. But even assuming that these alleged motivations were true, they neither would refute[13] nor, as a matter of law,

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12 By inventing nondiscriminatory interpretations of Board members' statements, the majority, like the district court reversed in *Miller v. WLFI Radio Inc.*, 687 F.2d 136 (6th Cir. 1982), deprived the Attorney General and the Defendant-Intervenors of a "fair opportunity" to prove discrimination and misapplied the applicable burden of proof. *Id.* at 139 (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981)). "In light of the courts' customary reliance on a litigant to select the interpretation of the facts most favorable to his own case, this is a singular result indeed." *Miller v. WFLI Radio Inc.*, 687 F.2d at 138 (vacating and remanding Title VII action where trier of fact invented non-discriminatory rationale for defendant's conduct).

13 At one point, the majority acknowledged that other courts have required that, "[i]n addition [to evidence of legitimate, nondiscriminatory motives], the plaintiff must furnish some affirmative evidence that the proposed changes were not motivated by a discriminatory purpose." App. 27a n.14. Having disregarded most of the evidence that race was a motivating factor for the Board's action, however, the majority simply ignored the lack of evidence from the Board rebutting this proof.

The only shred of evidence that the majority pointed to as countering the overwhelming evidence of discriminatory purpose is the fact that the School Board appointed Jerome Blunt, a black person, to a temporary position on the Board. App. 31a, 34a. But Blunt was appointed to a six-month position in an 89% white district in which, given the racially polarized voting in Bossier

preclude the conclusion that a discriminatory purpose was "a factor" in the Board's decision. *Arlington Heights*, 429 U.S. at 265-66. The majority, however, never applied this governing standard. App. 39a-40a n.2. As a result, it failed to recognize that other compelling evidence of record required denial of preclearance in this case.

E. When the Majority's Errors Are Cured, It Is Plain that the Board's Action Was Motivated in Part By Discriminatory Purpose

When all of the evidence of record is fairly considered and judged under the governing standards, only one legal decision is possible, the one reached by Judge Kessler: the evidence is "overwhelming" that racial discrimination in part "fueled" the Board's decision. App. 39a, 63a. That is the conclusion this Court should reach. And in reaching that conclusion, the Court need not decide that a majority-minority district was *required* in Bossier Parish's redistricting plan. That is not the issue; the issue is whether the School Board adopted the Police Jury plan in part for a discriminatory purpose. The evidence is overwhelming that it did.

Thus, stipulated and unrebutted evidence supports Judge Kessler's uncontested findings, and those findings compel an inference of discriminatory purpose under *Arlington Heights*. The most important of these are that: (1) Bossier is a racially-polarized jurisdiction and, based on that polarization, the Board effectively kept blacks from being elected and kept them from electing

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Parish, he had virtually no chance of election. Furthermore, the Board had an obvious motive for attempting to divert the attention of black voters from the redistricting process. App 54a n.9. In any case, the short-term appointment of a black member to the School Board in and of itself has little relevance to the Board's intention in adopting a long-term plan that plainly disfavored black voters.

candidates of their choice, even though they represent 20.1% of the population and 17.6% of the electorate, App. 40a; (2) Bossier is also a jurisdiction with a long history of discrimination in its schools, App. 42a-46a, and is one that has taken steps to prevent black citizens from influencing policy in those schools, App. 42a, 45a-46a; (3) the Board initially rejected the Police Jury plan, preferring instead to devise a plan of its own, one that might split precincts, App. 47a; (4) nevertheless, after the black community showed that majority-minority districts could properly be drawn, App. 41a, and even after a strong public outcry greeted the proposal to adopt the Police Jury plan, App. 48a-50a, the Board adopted the plan anyway—knowing that it violated many of its own traditional redistricting criteria, App. 50a-51a, and knowing also that the plan would effectively preclude blacks from electing their candidates of choice to the Board, App. 40a-41a; (5) nothing in the public record of the Board's decision indicated any reason for favoring the Police Jury plan, App. 50a; and (6) direct evidence indicated the "hostility" of several Board members toward any majority-black districts. App. 53a-54a.

Moreover, several of the majority's own findings support an inference of discriminatory purpose. Among these additional findings are that: (1) some of the Board's post-hoc rationalizations were "clearly . . . not real reasons" for its decision, App. 27a n.15;[14] (2) the Board considered black voters' concerns about vote dilution as "clouds over the . . . redistricting process" and

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[14] The majority's finding that the School Board proffered shifting justifications for its decision supports a conclusion that the Board acted with a discriminatory purpose. *See, e.g., Southwest Merchandising Corp. v. N.L.R.B.*, 53 F.3d 1334, 1344 (D.C. Cir. 1995); *E.E.O.C. v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994) (citing cases); *cf. St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2749 (1993).

concluded that "[a]ny port will do in a storm," App. 28a;[15] (3) Board member Myrick, who lives in an area that "would likely be included in any majority-black district to be drawn in the northern part of Bossier Parish," App. 81a (Stip. 48), lied about his involvement in the Police Jury's redistricting process, App. 5a, and promoted the Police Jury's plan to preserve his majority-white "constituency." App. 32a.

Finally, viewed in light of the relevant evidence, the two rationalizations for the Board's actions that the majority credited, App. 27a-28a—but which are legally insufficient to justify preclearance, *see supra* I.D.—actually are "*so flagrantly pretextual* as to further corroborate the conclusion that the School Board acted with discriminatory purpose." App. 59a (Kessler, J., dissenting) (emphasis added). Thus, the claimed desire to avoid or to minimize splitting precincts was clearly of little importance to the Board.[16] Likewise, the notion that the Police Jury plan offered "guaranteed preclearance" was plainly disingenuous. *See supra* pp. 22-23.

This Court should not preclear a plan on such a record. Unlike the majority, both the Attorney General and

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15 These findings confirm that the Board wished to avoid any further dealings with black-voter concerns and to cut short the risk that such voters might be able to elect Board members who would force serious consideration of these issues. This may not reflect racial animosity, but it is racial discrimination nonetheless. App. 143a (Stip. 256) (citing *Garza*, 918 F.2d at 778 n.1 (Kozinski, J., concurring in relevant part)).

16 As the majority recognized, the Board originally envisioned adopting a plan that split precincts. App. 29a; *id.* at 72a (Stip. 23); J.A 168 (Joiner). Although the Board was "always free to request precinct changes from the Police Jury," *id.* at 72a (Stip. 23), it neither calculated the cost of such changes nor approached "the Police Jury to request precinct changes" before it adopted the Police Jury plan. App. 7a.

Judge Kessler assessed the entirety of this "extensive record" and concluded that it overwhelmingly demonstrated racial discrimination. Judge Kessler's full assessment of the relevant evidence should be sustained.

II. THE BOSSIER PARISH SCHOOL BOARD'S PROPOSED REDISTRICTING PLAN ALSO VIOLATES SECTION 5 BECAUSE ITS IMPLEMENTATION WOULD CONSTITUTE A CLEAR VIOLATION OF SECTION 2

The majority below erred both in ruling that a violation of Section 2 does not constitute an independent basis for denying preclearance under Section 5 and in even reaching the issue in this case. The overwhelming proof of discriminatory purpose under Section 5 made it unnecessary to address the hypothetical question of whether an objection would be proper in a case in which *only* a Section 2 violation is shown. Accordingly, should this Court reverse on the ground that the majority failed to apply the standards set forth in *Arlington Heights* in assessing discriminatory purpose, the Court need not address the question whether preclearance may be denied based solely on a violation of Section 2.

On the other hand, if the Court determines that it should answer this important question in this case, we submit that the Attorney General has a duty under Section 5 to object to a voting change that constitutes a violation of Section 2. *See* Jurisdictional Statement of Janet Reno, *et al.*, at 23-27 (filed March 11, 1996).

When Congress amended the Voting Rights Act in 1982, it extended Section 5 and rejected the rule of *Mobile v. Bolden*, 446 U.S. 55 (1980), that proof of discriminatory purpose was necessary to establish unlawful vote dilution under Section 2. Prior to that time, the Court had interpreted Section 5 to allow denial of preclearance based on a finding of unconstitutional vote dilution. *Beer*, 425 U.S. at 141. Before *Bolden*, however, the constitutional and statutory Section 2

standards were identical—the "results test" of *White v. Regester*, 412 U.S. 755 (1973).[17] Because the standards for unlawful vote dilution under Section 2 and the Constitution diverged as a result of *Bolden* and the 1982 amendments, the question naturally arose whether Congress intended violations of amended Section 2 to remain within the ambit of Section 5.

Congress answered this question and indicated that it still "intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate Section 2." S. Rep. No. 417, 97th Cong. 2d Sess. 12 n. 31 (1982). Indeed, just this Term this Court noted that "there has never been any doubt . . . that changes in practices within covered jurisdictions that would be potentially objectionable under § 2 are also covered under § 5." *Morse v. Republican Party of Virginia*, 116 S. Ct. 1186, 1201 (1996) (plurality opinion). *See also id.* at 1236 ("§§ 2 and 5 would appear to be designed to work in tandem") (Thomas, J., dissenting).

A contrary interpretation of the Voting Rights Act, as this case makes clear, would be extremely impractical and would undermine congressional intent; indeed, it would require the Attorney General and the D.C. District Court to preclear plans that they know violate federal law. As this Court pointed out in *Morse*, "[i]f § 5 were narrower than § 2, then a covered jurisdiction would not need to preclear changes in voting practices known to be illegal." *Id.* at 1201.

The lower court's interpretation also would impose substantial burdens on covered jurisdictions like Bossier

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17 Indeed, the Court in *Beer* not only specifically noted that *White v. Regester* was the then-existing Fourteenth Amendment standard, but suggested that a plan violating that standard would also contravene the "effect" prong of Section 5. *Beer*, 425 U.S. at 142-43 n.14.

and private parties like the Defendant-Intervenors. Indeed, in a case—unlike this one—where unlawful vote dilution was established but the evidence fell short of establishing discriminatory purpose, the covered jurisdiction likely would have to defend a subsequent Section 2 case in which a local federal court would hear much of the same evidence considered in the Section 5 declaratory judgment action in the D.C. District Court. Bossier's stipulation that the court below should decide whether a Section 2 violation existed, App. 144a (Stip. 257), apparently reflects its desire to avoid this gross inefficiency. "It is unlikely that Congress intended such an anomalous result." *Morse*, 116 S. Ct. at 1201 (quoting *Chisom v. Roemer*, 501 U.S. 380, 402 (1991)).

Thus, the system intended by Congress and implemented by the Attorney General is fair and workable. In contrast, the court's ruling below ignores Congress' intent and creates an inefficient system of double litigation that will siphon resources from both the federal courts and local governments. Therefore, the decision below rejecting the Attorney General's long-standing interpretation of Section 5 is incorrect and provides an independent basis for reversing the decision below.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted,

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